



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

**1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023**

October 29 2003

Mr. Matt Thomas
City Solicitor
City of New Bedford
133 William Street, Room 201
New Bedford, Massachusetts 02740

Re: 740 Belleville Avenue
New Bedford, Massachusetts

Dear Mr. Thomas:

I am writing on behalf of the New England Region of the United States Environmental Protection Agency ("EPA") in response to your request for a "Comfort Letter" regarding the former Aerovox, Inc. facility located at 740 Belleville Avenue in New Bedford, Massachusetts (the "Property") and the possible disposition of the Property as a result of the bankruptcy proceedings of New Bedford Capacitor, Inc., formerly known as Aerovox, Inc. (referred to herein as "Debtor"). This Comfort Letter is based on the facts presently known to EPA and is provided for informational purposes.

The situation, as we understand it, is as follows. Debtor manufactured electrical capacitors at the Property from 1978 to 2001. Debtor's predecessor and a former operator of the Property used polychlorinated biphenyls ("PCBs") at the Property. EPA determined that the Property is contaminated with PCBs, both inside a building located on the Property, and in the soils. In 1999, Debtor and EPA executed an Administrative Order on Consent ("Order") pursuant to Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973. The Order required Debtor to, among other things, relocate its operations to a new facility and deposit approximately \$8 million, in periodic installments, into a trust fund, known as the "Aerovox Facility Fund," that would finance remediation of the site.

After making an initial deposit of \$750,000 to the Fund, the Debtor, on June 6, 2001, filed a voluntary petition under Chapter 11 of Title 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, as amended. As a result of the accrual of interest and asset appreciation, approximately \$900,000 is contained in the Aerovox Facility Fund.

The United States, on behalf of EPA, the Commonwealth of Massachusetts, on behalf of the Massachusetts Department of Environmental Protection ("DEP"), and the City of New Bedford each filed administrative claims in the bankruptcy case, seeking reimbursement of anticipated expenses associated with the Property. The parties reached a settlement of these

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claims, which has been approved by the bankruptcy court (hereafter the "Settlement Agreement"). Under the Settlement Agreement, the United States' administrative claim is allowed as an administrative priority claim, pursuant to Section 503 of the Bankruptcy Code, in the amount of \$200,000, and the United States' prepetition claim is allowed as a prepetition, nonpriority, general unsecured claim in the amount of \$8,235,000, less any amount by which the funds held in the Aerovox Facility Fund exceed \$830,000 as of the date of the Agreement's approval, and the Commonwealth's claim is withdrawn. The City's administrative claim is allowed as an administrative priority expense claim, pursuant to Section 503 of the Bankruptcy Code, in the amount of \$250,000.

Within thirty days of the bankruptcy court's approval of the Settlement Agreement, the Debtor must liquidate all funds in the Aerovox Facility Fund and transfer those funds to the United States, to be used solely to conduct or finance response actions at or in connection with the Property. Pursuant to the Settlement Agreement, EPA is responsible for selecting any response actions undertaken at the Property under CERCLA, after a reasonable opportunity for review and comment by the Commonwealth. EPA and DEP are authorized by Debtor to enter and have continued access to the Property for purposes of investigation and remediation of the Property. The City must use the funds it receives from the bankruptcy estate to maintain and secure the Property, including the operation and maintenance of the fire suppression system at the site, until the Property is sold or the funds are exhausted, whichever occurs first.

Under the Settlement Agreement, the Debtor agrees, in lieu of its right to immediate abandonment of the Property pursuant to Section 554 of the U.S. Bankruptcy Code, to retain title to the Property until the earlier of two years from the date of the Settlement Agreement or the entry of a final bankruptcy decree (but in no event, earlier than December 31, 2003). This period of time is referred to as the "Holding Period."

The purpose of the Holding Period is to provide the City with a reasonable opportunity to arrange for the orderly transfer of the Property to a Brownfields developer, and to avoid, if possible, the immediate transfer, or acceptance at any time of title to the Property through abandonment or other proceedings. In the event that title is not transferred to a Brownfields developer during the Holding Period, then the Property will be deemed formally abandoned pursuant to the U.S. Bankruptcy Code.

Representatives of the City have explained that the City must decide among the following options if a Brownfields developer cannot be secured during the Holding Period: (1) take title to the Property; (2) direct transfer of title to the New Bedford Redevelopment Authority or some similar entity; (3) foreclose its mortgage¹; or (4) allow the Property to be deemed abandoned, and

¹ Pursuant to the Settlement Agreement, the City is being granted a mortgage to secure its claim for unpaid taxes. The purpose of this mortgage is to establish a right of priority in the Property vis a vis third party creditors and to provide a mechanism that is less cumbersome and time consuming than a Massachusetts tax foreclosure.

foreclose on a future tax lien. In the event the City does take title by virtue of a deed from the Debtor, the City has determined that this transaction is deemed a deed in lieu of foreclosing its tax lien pursuant to G.L. c. 60, § 79.

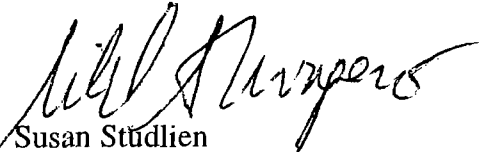
Representatives of the City have explained that the City's sole purpose in foreclosing on its mortgage securing the tax liens, or foreclosing on the future tax liens, or accepting a deed-in-lieu of foreclosure, or directing transfer to the New Bedford Redevelopment Authority or similar authority, would be to fulfill its functions as a sovereign to secure the property against harms to the environment, public safety, health and welfare. City representatives have stated that the City does not wish to take title or transfer title to a redevelopment authority; however, it recognizes the risk that no third party developer will be secured during the Holding Period and acknowledges that as a practical matter, the City will have no choice but to take title in order to facilitate the ultimate redevelopment of the Property.

While an "owner or operator" of contaminated property is generally liable under Section 107 of CERCLA, the statutory definition of these terms specifically excludes a municipality that acquired ownership of the property involuntarily, through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign, unless the municipality has caused or contributed to the release or threat of release of hazardous substances from the property. 42 U.S.C. § 9601(20)(D). Accordingly, if the City acquires ownership of the Property through tax delinquency proceedings, either through a foreclosure of its tax lien or of the mortgage given pursuant to the Settlement Agreement, or by taking a deed in lieu of foreclosure, pursuant to any of its authorities under Massachusetts law, or otherwise involuntarily acquiring title, under the circumstances set forth above and for the purpose of facilitating the orderly transfer of the property to a Brownfields redeveloper, the City will not be subject to liability under CERCLA for "response costs" and other costs enumerated under Section 107(a) of CERCLA, as an "owner or operator" of the Property, unless the municipality causes or contributes to the release or threat of release of hazardous substances from the Property. 42 U.S.C. § 9601(20)(D).

Please be aware that CERCLA, Section 107(d) protects state and local governments from potential CERCLA liability arising from emergency response actions. In particular, CERCLA, Section 107(d) provides, in pertinent part, that a State or local government is not liable under CERCLA for costs or damages as a result of actions taken in response to an emergency created by a release or threatened release of a hazardous substance generated by or from a facility owned by another person. However, this protection does not apply to costs or damages resulting from gross negligence or intentional misconduct by a State or local government, including reckless, willful, or wanton misconduct.

Please feel free to contact attorney Eve Vaudo at (617) 918-1089 if you have any questions regarding the above information. You may wish to contact Jonathan Hobill at (508) 946-2870 for information about DEP's activities at the Site.

Sincerely,



for Susan Studlien

Acting Director, Office of Site Remediation and Restoration